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COMPLAINT

August 21, 2003

Ms. Karen Higginbotham
Director, Office of Civil Rights
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave. N.W.
Washington, DC 20460

By Certified Mail

Re: Title VI Civil Rights Complaint against the Oklahoma Department of Environmental Quality

Dear Director Higginbotham,

Members of the Ponca Tribe (herein the "Complainants") are hereby filing this administrative complaint pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000d (hereafter "Title VI") against the State of Oklahoma acting through the Oklahoma Department of Environmental Quality ("DEQ"), herein the "Defendant." This complaint alleges continuing environmental injustice and interrelated inequities.

The U. S. Environmental Protection Agency ("EPA") and EPA's Office of Civil Rights have jurisdiction over this matter because the Oklahoma Department of Environmental Quality oversees the request, application, receipt, deployment and administration of federal funds from the EPA for public health and environmental protection purposes.

Complainants allege that the DEQ discriminates against members of the Ponca Tribe and other low income residents of Ponca City and Kaye County, Oklahoma by ignoring their environmental protection and public health needs in violation of the Title VI of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000d and its implementing regulations which are codified at 40 C.F.R. Part 7 ("Title VI").

Members of the Ponca Tribe allege that the DEQ has engaged in concerted and systematic discriminatory conduct through the circumvention of laws, indifference to environmental regulations and responsibilities, and discriminatory permitting and enforcement practices. These actions deny minorities, including people of color and low-income citizens, equal protection of the law.

Because the DEQ and the State of Oklahoma receive federal funds from the EPA, they are obligated to comply with Title VI of the Civil Rights Act of 1964, which prohibits discrimination in programs using federal funds. Moreover, Presidential Executive Order No. 12898 on Environmental Justice affirms and prescribes fundamental requirements for federal agencies to insure that all federal programs and federally funded agencies shall not be allowed to increase the disproportionate burdens of environmental hazards in communities of color and low-income neighborhoods. Such are the neighborhoods impacted by Continental Carbon Company's operations.

This complaint necessarily covers events over a period of years in order to demonstrate a clear pattern of discriminatory conduct and disproportionate adverse environmental impacts. Included with this complaint are various Exhibits, the first of which is a copy of Presidential Executive Order No. 12898. Numerous documents that are referenced by endnotes will be provided upon request. Please consider this letter as part of this formal complaint.

Sincerely,



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Cc: Marianne Lamont Horinko, Administrator, U.S. EPA
Mr. Richard E. Greene Regional Administrator, Region VI, EPA
State of Oklahoma Environmental Quality Board
Mr. Drew Edmondson, Attorney General of Oklahoma
Mr. Steve Thompson, Executive Director, Oklahoma Department of Environmental Quality
Honorable Brad Henry, Governor, State of Oklahoma
Indigenous Environmental Network

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OFFICE OF CIVIL RIGHTS
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MEMBERS OF THE PONCA TRIBE,	§
	§ <u>COMPLAINT</u>
Complainant,	§ of Discriminatory Practices
	§ of the Oklahoma Department of
v.	§ Environmental Quality in violation
	§ of Title VI of the Civil Rights Act
Oklahoma Department of Environmental Quality,	§ of 1964, 42 U.S.C. Sec. 2000d
	§
Defendant	§
	§
	§

I. Description of Parties:

A. Complainants:

Members of the Ponca Tribe enjoy a unique ancestral relationship to both the land on which the Continental Carbon facility sits, to the land which is impacted by Continental Carbon's air pollution, and to the Arkansas River, to which Continental Carbon's illicit discharges migrate.

Members of the Ponca Tribe live on Tribal lands downstream and adjacent to the Arkansas River. Members of the Ponca Tribe also live immediately to the West, and in some cases adjacent to Continental Carbon's facility. The average annual income of Ponca Tribe members, most severely impacted by Continental Carbon's pollution, is approximately \$5,000.¹

Members of the Ponca Tribe seek, among other things, to safeguard their health and welfare and the natural environment to which they have their unique ancestral relationship.

B. Defendant:

The Oklahoma Department of Environmental Quality (DEQ) is the Defendant. The DEQ Oklahoma has been delegated the authority to administer an NPDES program pursuant to 33 U.S.C. §1342(b). The Oklahoma Department of Environmental Quality has been delegated to issue permit for the construction and operation of facilities in accordance with Title V of the federal Clean Air Act (42 U.S.C. 7401, et seq.). The Oklahoma Department of Environmental Quality receives federal funds.

The DEQ has statutory and delegated authority to regulate operations of Continental Carbon Company's carbon black plant, Facility ID No. 1-36000130, located in Kaye County Oklahoma.

II. Description of Continental Carbon Company, the Polluting Facility

The Continental Carbon Company facility is located just south of Ponca City, Oklahoma and sits several hundred yards to the west of the Arkansas River. Continental Carbon is a subsidiary of China Synthetic Rubber Company and Taiwan Cement Company. These Taiwan business entities were purchased the facility from Witco Corporation in 1995. The facility has been in operation since 1954 and manufactures carbon black, a component of tires and other rubber and plastic products. The process uses distillation bottoms and other by-products obtained from nearby refineries. The process also uses similar by-products from non-refinery sources. The facility processes these "residuals" or "wastes" in four reactor units supported by various pumps, filters, boilers, catalyst injectors, quenching systems, and tanks. The facility has wastewater management system including what are supposed to be "no-discharge" wastewater lagoons that collect contaminated stormwater run-off and spills from process and non-process areas of the facility.

Continental Carbon Company's operations create air pollution emissions, contaminated wastewater, and industrial waste, all of which impact the members and lands of the Ponca Tribe.

III. Summary of Defendants Discriminatory Actions and Disparate Industrial Pollution Impacts on Members of the Ponca Tribe

A. Summary of Air Pollution Impacts and Defendants Discriminatory Actions

There is a group of homes immediately to the west to the carbon black facility, and groups of homes further away to the south, east, and north. It is well documented that the homes in both areas are impacted by Continental Carbon's pollution. It is not the intent of this complaint to minimize the seriousness of the pollution impacts suffered by non-Tribal members. However, homes located closest to the facility are occupied by members of the Ponca Tribe and are often the most severely impacted by Continental Carbon's pollution.

Unlike the predominantly Caucasian and more affluent families living further from the plant, members of the Ponca Tribe do not get their polluted properties cleaned at the company's expense, and have not received compensation from the company for damages caused by air pollution emissions. Neither have these members of the Ponca Tribe had their complaints investigated by the DEQ, or their air monitored or sampled by the company or DEQ.

Members of the Ponca Tribe continue to experience frequent and preventable exposures to Continental Carbon's air pollution emissions. For years families living near the facility have complained of odors and carbon black fallout that settles on and in their homes.

Families also complain of health problems caused or made worse by the facilities emissions. These include respiratory problems, including a high incidence of asthma.

Carbon black dust that can get into the deepest recesses of the lungs is listed as a cancer causing chemical by the International Agency for Research on Cancer and the California Environmental Protection Agency. A recent study published in Journal of the American Medical Association shows a strong link yet between fine particle pollution and increased lung cancer and cardiovascular mortality.

The officials of Oklahoma Department of Environmental Quality have allowed members of the Ponca Tribe and others to be subjected to dangerous pollution that would never tolerated in their own communities. Continental Carbon's long history of air pollution violations and disproportionate adverse impacts on members of the Ponca Tribe, mirrors the DEQ's long history of discriminatory permitting and enforcement practices.

A February 10, 1994 letter from Genevieve Pollak, Chairman of the Ponca Tribe of Oklahoma the Ponca to State and County Health Department [predecessor to DEQ] expressed concern for the health of fifty people living in the ten homes next to Continental Carbon. (Exhibit 2) The letter was in response to a company permit modification proposal that would result in an increase in air pollution emissions. The letter states:

"Please consider this letter a request to have the impact of such an increase in the black particles, which are severe now, on the health and well being of not only the Indian families residing in this area, but other races as well. The black is in the air outside and infiltrates into the homes in the area, even though no windows or doors are open."

When the DEQ held a required March 24, 1994 public hearing on the company's proposal, Ponca Tribe members who lived next to the facility testified about the frequency and severity of the air pollution emissions. The following testimony was given by Ponca Tribe member [REDACTED],

"I listened to the comments tonight on all the emissions controls and emissions things, but it still stinks out there. It's really bad. Like my carpet in my house. When you first go I the door, its black, and its hard to keep clean. I mean, its there...I have two children with asthma. I cough a lot. My little boy is a chronic asthma sufferer...The neighbors to my east...they have several children in that area that have asthma... You know, when the wind is out of the east, the stench is almost unbearable. There are times that my family and I picked up and went to town to get away from it."

The concerns expressed by the Ponca Tribe and its members in the Spring of 1994, related to the modification of carbon black production Unit 4 that was built and first permitted in 1991. From the moment Unit No. 4 began operating in October of 1991, it was allowed to operate in violation of its emissions limits.² A June 1992 Notice of Violation resulted in a DEQ Consent Order that gave the company until February 1, 1994 to be in "full compliance." This deadline was over two years from the time Unit No. 4 had been operating in violation.³ During this time, Ponca Tribe members and others were

left to suffer from the company's air pollution emissions. The violation was eventually resolved when the DEQ increased the allowable emissions limits so that company could achieve compliance.

Citizen air pollution complaints continued into 1995 when the DEQ and the company entered into a "Memorandum of Understanding" and committed to specific actions that were supposed to address the fugitive emissions of carbon black. These actions included the holding of community meetings, dissemination of information, and environmental testing.

As documented in following sections of this complaint, the DEQ and the company failed to fulfill important commitments of the Memorandum of Understanding that would have most benefited members of the Ponca Tribe. For example, the DEQ refused to do environmental sampling. Instead, the agency allowed the company to investigate citizen complaints by using sampling methods that were known by the DEQ to be flawed. The DEQ knew, but never informed citizens, that the company's environmental sampling was being used to mislead them. In fact, the DEQ investigators would seek to minimize citizen concerns by referencing the company's sampling activities.

The continuing air pollution impacts on members of Ponca Tribe is further evidenced by the admitted air pollution impacts on predominately Caucasian families who live just beyond the homes of Ponca Tribe families. A September 1999 Continental Carbon Company internal document states,⁴

"Carbon black is very penetrating and tends to travel long distances in natural air currents. The plant is subject to complaints from residents living southwest of the area on Highway 177. Nuisance dust is deposited inside residences and on outdoor property. Neighboring properties are cleaned every one (1) to three (3) months." (Exhibit 3)

If Continental Carbon Company and the DEQ were aware that air pollution emissions were impacting predominately Caucasian families living southwest of the facility, the company and the DEQ were also aware that Ponca Tribe families living even closer to the facility were being severely.

On April 11, 2002, a DEQ representative was sent to attend a Public Meeting concerning Continental Carbon Company that was sponsored by State Senator, Paul Muegge, Ponca City Mayor, Tom Lenard, and local Pastor [REDACTED]. An report on the meeting prepared by DEQ staff person stated,

"[REDACTED] and Ron Sharon [Sherron] both spoke of concerns for Ponca tribal members who live immediately adjacent to the plant. [REDACTED] is one of the homeowner and Mr. Sharon is the Director of the Ponca tribe Office of Environmental Management. Both expressed concerns over black dust that blankets the homes and vegetation in the area."⁵

The DEQ report was sent to DEQ's Executive Director, Mark Coleman, and Deputy Executive Director, Steve Thompson. However, no effort was made by the DEQ to investigate the complaints or contact representatives of the Ponca Tribe. In early 2002,

DEQ staff met twice with concerned citizens, including representatives of the Ponca tribe. After Steve Thompson assumed the position of DEQ's Executive Director, he and other DEQ representatives refused to meet with concerned citizens, including representatives of the Ponca Office of Environmental Management, the Indigenous Environmental Network, and the Just Transition Alliance.⁶ In April of 2003, Mr. Thompson wrote a letter to State Environmental Quality Board members and DEQ staff discouraging them from attending a public meeting in Ponca City that was being sponsored by the Ponca Tribe's Office of Environmental management. The purpose of the public meeting, which was attended by four EPA representatives, was to educate both EPA and DEQ officials about the serious pollution problems being experienced by Continental Carbon's neighbors.⁷

DEQ's continued refusal to meet with representatives of the Ponca Tribe and other concerned citizens resulted in a May 19, 2003 sit-in protest at DEQ's state office. The protest also followed DEQ's decision to cease investigations of citizens' complaints of air pollution from Continental Carbon. Although the sit-in protest resulted in DEQ's agreement to meet with citizens about their concerns, the DEQ is still not investigating citizens' air pollution complaints.⁸

The following sections of this complaint detail the DEQ's failure to enforce and fulfill commitments set forth in a 1995 Memorandum of Understanding that was supposed to address the company's air pollution problem. Also detailed, is the DEQ refusal to investigate alleged violations of the company's Title V Operating Permit. Provisions of the Title V Permit alleged to be violated relate to fugitive carbon black emissions and the improper operation of air pollution control equipment.

For months, the DEQ refused to investigate a complaint alleging the unsafe operation of a thermal oxidizer. In December of 2002 it was reported to the DEQ that structural damage from overheating, which has since been confirmed, caused the oxidizer's 150-foot tall stack tower to lean. Had the tower toppled before it was dismantled, employees could have been killed and the homes of nearby Ponca Tribe members would have been impacted.

Ponca Tribe members' health, quality of life, and property values have been harmed and placed at risk by Defendant DEQ's discriminatory enforcement practices, including the failure to investigate complaints of air permit violations, and the failure to adequately investigate such complaints. .

B. Summary of Water Pollution Impacts and Defendants Discriminatory Actions

Members of the Ponca Tribe own land along the shore of the Arkansas River nearby and downstream from Continental Carbon's facility. Some members of the Tribe use the Arkansas River in the immediate downstream area of Continental Carbon for recreation, fishing, and watering livestock. Some members also have shallow water wells near the river. These wells are believed to be hydrologically connected to the river. Continental Carbon has a no-discharge wastewater permit for a wastewater treatment and disposal

system that includes four wastewater lagoons. The lagoons are located on the eastern side of the facility only a few hundred yards from Arkansas River.

In February of 2002, the Ponca Tribe's Office of Environmental Management discovered and reported discharges of black contaminated water seeping from the ground below one of the wastewater lagoons. This contaminated water was flowing toward the Arkansas River and collected in a pond along the banks of the river. This pond emptied into the river when it filled or when the river rose and washed through the pond.

A subsequent DEQ investigation confirmed the Ponca Tribe's complaint and Continental Carbon Company was cited for violations of state and federal water pollution laws, including the unauthorized discharge of wastewater. However, in response to the violation, the DEQ negotiated a Consent Order with the company that called for an investigation that ignored the area where the discharge violation occurred.

Additional violations relating to Continental Carbon's wastewater treatment and disposal system were identified by citizens and brought to DEQ's attention. These including operating the system for more than two years without a valid permit, and misrepresenting important information on the application for the permit that authorized operation of the system. The misrepresentation of groundwater depths on the permit application allowed the company's waster lagoons to be operated over extremely shallow groundwater levels in violation of the DEQ's regulations. Even though the company refused the DEQ's request for the installation groundwater monitoring wells, the DEQ refused to exercise its authority to require the installation of these wells, or the upgrading of the lagoons to meet current standards.

Ponca Tribe members' uses of the river and its shores and waters are harmed by Continental Carbon's discharges and threatened discharges. Ponca Tribe members' uses of the river and its shores and waters are also harmed by the Defendant DEQ's continuing failure to investigate and adequately investigate alleged violations, the failure to enforce state and federal water pollution laws, and the failure to require corrective actions. The DEQ's discriminatory permitting and enforcement practices are detailed in following sections.

C. Summary of Industrial and Solid Waste Impacts and Defendants Discriminatory Actions

Continental Carbon Company owns property, including woods and wetlands, between its facility and the Arkansas River. The company allowed unhindered dumping of household trash and construction debris in this area until representatives of the Ponca Tribe and others complained to the DEQ. The complaint followed the discovery, by the Ponca Tribe and others, of an industrial waste dump found in this same area. Along with the trash and other debris found on company property, were approximately twenty (20) discarded chemical barrels, materials from carbon black production units, and thousands of pounds of discarded carbon black. Water from springs and/or leaking wastewater

lagoons seeped from the ground and flowed through this waste toward the Arkansas River.

As detailed in following sections of this complaint, the DEQ performed inadequate sampling and analysis of the industrial waste site, and allowed the company to conduct an unsupervised "cleanup" of the site that left debris, carbon black, and oily sludge behind. Photographs of the DEQ approved "cleanup" are attached as Exhibits. Representatives of the Ponca Tribe and others asked to be notified by the DEQ when the cleanup was to take place. However, the DEQ refused to give this notification.

As detailed in the following sections of this complaint, some of the waste discovered by the Ponca Tribe and others, was covered-up instead of cleaned-up. Springs or seeps from the ground were also buried, including those that may have evidenced the leaking wastewater lagoons.

The Ponca Tribe's members' uses of the river and its shores and waters are threatened, if not harmed, by Continental Carbon's unpermitted and only partially remediated dumpsite. Ponca Tribe members' uses of the river and its shores and groundwater are also threatened, if not harmed by the DEQ's continuing failure to investigate and conduct adequate investigations; the failure to enforce waste disposal laws; and the failure to require proper remediation of contaminated areas. The DEQ's discriminatory enforcement practices are detailed in following sections.

IV. Disproportionate Impacts of Pollution on People of Color and Low Income Citizens

A. Scholarly Studies

Members of the Ponca Tribe recognize that the Office of Civil Rights is well aware of studies and anecdotal evidence establishing that the hazards posed by pollution, including toxic and hazardous wastes in the United States is disproportionately borne by people of color and low income communities.

B. Legal Authorities

The complainants bring this administrative action pursuant to Title VI of the Civil Rights Act of 1964. The complainants note that the subject of the complaint also implicates the Constitution of the United States. Members of the Ponca Tribe further acknowledges that the Office of Civil Rights' expertise in this area of law and will only briefly, and for the purposes of clarity, review the mandate of Title VI, 42 U.S.C. Sec. 2000d in relevant paragraphs:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. 42 U.S.C. §2000d, Title VI, Section 601.

The Act also provides in Section 602:

Each federal department and agency which is empowered to extend federal financial assistance to any program or activity... is authorized and directed to effectuate provisions of Section 2000d of this Title with respect to such program or activity by issuing rules, regulations and orders... which shall be consistent with the achievement of the objectives of the Statute authorizing the financial assistance in connection with which the action is taken. 42 U.S.C § 2000d-1, Title VI, Section 602.

The EPA's applicable regulations prohibit not only intentional discrimination, but also uses of federal funds that have discriminatory effects. The EPA regulations implementing Title VI state:

A recipient shall not use criteria or methods of administering its program which has the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of *defeating or substantially impairing accomplishment of the objectives of the program* with respect to individuals of a particular race, color, national origin, or sex. 40 C.F.R. §7.35 (b) (emphasis added)

Thus, under Title VI and EPA's implementing regulations, programs receiving EPA funds may not be administered in a manner that has the practical effect of subjecting individuals to discrimination based upon race. As set forth below, however, the actions of the Oklahoma Department of Environmental Quality do just that

V. Evidence of Defendant's Violations of Title VI of the Civil Rights Act of 1964.

A. DEQ's Discriminatory Permitting and Enforcement Practices and Resulting Air Pollution Impacts

Before 1991 there were three production Units at the facility, which at the time, was owned by Witco Corporation. The addition of Unit No. 4 to the facility in 1991 significantly increased air pollution emissions that impacted Ponca Tribe members. The facility added emissions of up to 1,432 tons per year of sulfur dioxide (SO₂), almost 49 tons per year of particulate matter of 10 microns or less (PM₁₀), almost 11 tons per year of hydrogen sulfide (H₂S), almost 60 tons per year of volatile organic compounds (VOC), 1,342 tons per year of carbon monoxide (CO), 612 tons per year of nitrogen oxides (NO_x), and 16 tons per year of total reduced sulfur compounds (H₂S, COS, and CS₂).⁹

From the moment Unit No. 4 began operating in October of 1991, it was operated in violation of its permit.¹⁰ The Unit failed numerous performance tests that were required to demonstrate compliance with emissions limitations.¹¹ The Unit released more than the allowable amounts of air pollution, including emissions of sulfur dioxide, particulate matter, nitrogen oxides, carbon monoxide, and volatile organic compounds. Rather than exercise its authority to revoke the permit and cause the operations of the Unit to cease, the DEQ allowed the company to continue operating the Unit in violation of the permit. In April of 1993, with Unit No. 4 still operating in violation of allowable emissions limits, the company submitted an application to modify the permit. According to DEQ,

the purpose of doing so was "to raise emission limits so that previous performance tests indicate compliance."¹²

A January 6, 1994 DEQ Consent Order gave the Witco until February 1, 1994 to be in "full compliance" with the permit and applicable rules. This deadline was over two years from the time the Unit had been operating in violation.¹³ (Exhibit 4) Citizen complaints continued after the January 6, 1994 Consent Order and the February 1, 1994 deadline for compliance. Even though the DEQ closed the enforcement case related to Unit 4 permit violations, citizen complaints of air pollution emissions continued. Rather than take enforcement action against the company, the DEQ entered into a March 3, 1995 Memorandum of Understanding, wherein the company promised future action to address the air pollution problem. (Exhibit 5) The Memorandum of Understanding allowed Witco to continue operating Unit No. 4, and for the DEQ to officially close its enforcement case.¹⁴

The DEQ's action was summed up in a December 22, 1994 internal memorandum that stated,

"The facility did not comply with the permit limitations of Permit No. 89-020-C (PSD) (M-1). In exchange for authorization to emit NOX, SO2, etc. *at higher levels* [emphasis supplied], Witco has committed to elimination of carbon black emissions in older parts of the plant." ¹⁵

Put simply, the DEQ allowed the facility to violate its permit, and ultimately increase air pollution emissions, in exchange for the company's promise of future action. That promise was embodied in the March 3, 1995 "Memorandum of Understanding." It was a promise to members of the Ponca Tribe and other citizens of Oklahoma that was broken by the DEQ and the company.

The Memorandum of Understanding required actions and measures "to identify and control the release of fugitive carbon black emissions from the facility." The commitments contained in the Memorandum carried forth to "Witco's successors and assigns", including "any purchaser" of its carbon black production facility. Therefore, Continental Carbon Company, who purchased the facility in June of 1995, was obligated to perform the required actions and measures of the Memorandum of Understanding.. Likewise, the DEQ was obligated to fulfill the commitments it made in the Memorandum. In fact, the issuance of the modified permit for production Unit 4 by the DEQ was to have been contingent upon the Memorandum being "fully executed."

The Memorandum of Understanding required, among other things, that Continental Carbon Company, "sample the material deposited upon neighboring property after receiving complaints of 'dusting' and submit said sample to a laboratory for analysis to determine the presence of carbon black." The company was to "submit to the DEQ a sufficient quantity of each of the samples taken so as to allow the DEQ to perform its own analysis of the sample." The company was also "to allow side by side sampling and/or observation of sampling as determined to be necessary by DEQ."

To date, the DEQ has not taken or analyzed samples of suspected carbon black emissions from the homes or properties in the area of Continental Carbon's facility.¹⁶ Although the company took samples from complainants properties located in the general area of the facility, DEQ records indicate that no samples have been taken by the company from the homes or properties of Ponca Tribe members living closest to the facility.

Although the Memorandum of Understanding recognized the need for the DEQ to conduct "side-by-side" sampling to verify company findings, no such side-by-side sampling has occurred. Furthermore, the DEQ has never been present to witness the company's sampling. In fact, the DEQ refused numerous requests by complainants who wanted the agency to take samples of the carbon black that settled in their homes and on their properties.¹⁷

The obvious need for side-by-side sampling was ignored by the DEQ, even though the DEQ's Air Quality Program staff described Continental Carbon's sampling and testing protocol as "unacceptable" because it would "likely introduce a strong negative bias into the data."¹⁸ (Exhibit 6)

The need for independent and unbiased pollution sampling was made clear, but again ignored by the DEQ, when the first eighteen (18) samples taken in 1995 were determined by the company *not* be caused by the company.¹⁹ The July 1995 internal DEQ memorandum that expressed concerns about the company's "unacceptable" sampling methods was sent to Larry Byrum, Director of the DEQ's Air Quality Program.²⁰

As of May 26, 1996, more than a year after the signing of the Memorandum of Understanding, DEQ staff was still characterizing the company's sampling method as "flawed."²¹ (Exhibit 7) This information was never shared with pollution victims whose homes and properties were being sampled by the company, and who were being assured that the black dust found on their property was not from the company.²² In October of 1995, the company told DEQ that it would not change its sampling protocol and that its sampling was never intended to determine compliance with its permit.²³

Because the company's sampling method was recognized by the DEQ to be flawed, the agency considered taking their own samples and sending them to an outside lab for analysis. However, this was never done. Instead, the DEQ remained silent while the company used its sampling methods to convince citizens that black dust and powder on their properties was not from the company.

The DEQ considered, but ruled out the option, "to split samples and store them until for future work if a method which will provide acceptable results can be found."²⁴ By ruling out this option, Continental Carbon's pollution victims were left to rely only on the company's investigations and sampling, which DEQ knew to be flawed and unreliable. It is no surprise that of the twenty-three (23) samples of pollution analyzed by the company in 2002, none were determined to be from company.²⁵ DEQ has never took samples to verify the company's findings.²⁶

As the following excerpts from a sample of DEQ investigation reports makes clear, carbon black pollution was found on properties of complaining citizens. DEQ investigators, who usually showed up hours, and sometimes days after receiving a complaint, stated,

"I observed black particulate matter on outdoor premises and work trucks." (Complaint investigated of 3-17-03)²⁷

"I observed a heavy deposit of fine black powdery solids on CP's [Complaining Party's] outdoor premises, furniture, and equipment." (Complaint Inspection of 10-17-02)²⁸

"Observed fine, black, powdery material on CP's outdoor property and vehicle. CP said material was deposited overnight." (Complaint Inspection of 10-11-01)²⁹

"Specialist Garylee Walze contacted Environmental Specialist Brandon Bowman and asked him to visit with the complainant and see if he could observe carbon dust in the air...Mr. Bowman observed that he could see the dust on the complainant's property, but Mr. Bowman reported that he could not see it in the air." (Complaint Inspection 6-5-00)³⁰

"I observed a slight layer of a fine black powder on window sills, concrete walks, tables, chairs, and other items at the site. The powder smeared into streaks when rubbed with a cloth or hand." (Complaint Inspection of 3-27-00)³¹

"I observed heavy coatings of fine black particulate on complainant's outdoor premises." (Complaint Inspection of 8-20-99)³²

"Met complainant and observed fine, black, powdery material resembling graphite on CP's vehicles...frequent complaints have been received referencing this facility." (Complaint Inspection of 12-30-98)³³

"Cullen [DEQ investigator] met complainant and observed a very heavy coating fine, black powdery substance on his outdoor property. He also reported that the black material had come into the house through open windows" (Complaint Inspection of 9-11-97)³⁴

"Cullin - I met CP at the residence of a neighbor where I observed fine, black powdery material inside the neighbors residence on windowsills. Countertops, and dining table." (Complaint Inspection of 5-21-96)³⁵

In February of 1998, almost three years after the signing of the Memorandum of Understanding, Continental Carbon's Plant Manager, John Luton, admitted to DEQ investigators that the company was responsible for continuing complaints. A February 28, 1998 complaint investigation report states,

"Mr. Luton [Plant Manager] explained that he was familiar with the complaints, and that he was confident that most of the complaints were the result of fugitives from the facility."³⁶

Even though the Memorandum of Understanding was not fully executed, the DEQ falsely represented to the citizens that it was being used to address their complaints. The DEQ also referenced, and legitimized, the company's sampling to give citizens the false

impression that it was being used to establish the company's compliance. A November 5, 1999 DEQ letter to a citizen who complained of carbon black emissions states,

"The Department has entered into a Memorandum of Understanding with the Company in which both parties committed to resolve outstanding issues concerning the carbon black emissions." The letter also states that the company, "agreed to sample material deposited upon neighboring property owners after receiving complaints." ³⁷ (Exhibit 8)

To date, the DEQ has yet to inform pollution victims that the company's sampling methods are considered by the DEQ to be "flawed" and "unacceptable," and do *not* necessarily indicate the company is in compliance.

The DEQ clearly violated the Memorandum of Understanding by issuing Permit No. 89-020-C (PSD) (M-2) without the Memorandum being "fully executed." The improper, if not illegal, issuance of the permit dramatically increased air pollution emissions and disproportionate adverse impacts on members of the Ponca Tribe. The Memorandum of Understanding was supposed to "continue in effect unless modified by mutual written consent of both parties." However, no such mutual consent is evidenced in DEQ files.

As of the filing of this Complaint, DEQ inspectors who have the authority to confirm a violation of visible emissions (opacity) from the company's stacks, must drive approximately 100 miles from DEQ headquarters in Oklahoma City. There are still no DEQ employees in the Ponca City area authorized to confirm such violations.³⁸ In recent years, the DEQ has failed to initiate enforcement action when credible eyewitnesses, including their own investigators, have reported fugitive emissions crossing the company's property line.³⁹

DEQ now interprets its rules to say that an investigator must be present to witness the fugitive dust emissions crossing the company's property line. If the emissions are coming from the stacks of the company, a certified smoke (opacity) reader must witness the event, DEQ now says.⁴⁰ However, in 1998 the DEQ issued a Notice of Violation against Continental Carbon for polluting people's property without such emissions being witnessed by an investigator.⁴¹ The complaints that led to this rare enforcement action involved the same coatings of black dust or particulates that have since been identified by DEQ investigators at the homes of citizens on numerous other occasions.⁴²

The 1998 Notice of Violation was issued, in part, because the pollution of complainant's homes was associated with pollution events documented at the facility. However, the DEQ has since failed to take enforcement action in similar situations where the pollution of people's homes was associated with a documented pollution event at the facility.⁴³ After the most recent example in March of 2003, the DEQ ceased investigating citizens' complaints altogether. (Exhibit 9) As of August 2003, investigations of continuing complaints have yet to be resumed.

In August of 2003, the DEQ suggested to representatives of the Ponca Tribe and others that they "petition" the State Environmental Quality Board for a change in the wording of DEQ's Rules.⁴⁴ The DEQ's asserts that the wording of the rules, and not the agency's

failure to enforce the Rules, stands in the way of enforcement action. Members of the Ponca Tribe and others do not agree with this assertion, but have petitioned the Board, as DEQ staff suggested. However, it should be noted that the DEQ has long been aware of its own authority to petition for an emergency rule change, but chose not to do so.⁴⁵

On June 6, 2003 DEQ staff finally admitted to the existence of a continuing air pollution problem that required a review of their rules and investigation procedures. However, when the same DEQ staff met with concerned citizens two months later on August 6, they had no plans for changing their investigation procedures. Neither had they contacted other state environmental agencies to see how they were dealing with similar pollution problems. While the DEQ continued business as usual, Continental Carbon's pollution continued and citizens' were still not being investigated.

The DEQ's existing complaint investigation procedures, and the fact that many pollution events happen at night and on weekends when DEQ offices are closed, virtually assures that the company will continue to escape enforcement action and additional requirements to reduce air pollution emissions. As DEQ knows, the citizens most severely impacted by these emissions, are often members of the Ponca Tribe.

B. DEQ's refusal to investigate and/or adequately investigate alleged violations of Continental Carbon Company's Title V Operating Permit regarding:

1. Emissions of Carbon Black

When Continental Carbon took over the plant in June of 1995, the company was operating under six different air permits. A seventh permit, issued in January 1996 authorized the facility to install thermal oxidizers, increase the maximum sulfur content in feedstock oils, and increase production. This modification resulted in a significant net increase in emissions of nitrogen oxides (NOX), sulfur dioxide (SO₂) and particulate matter (PM₁₀).

In April of 2000 Continental Carbon Company received its Title V Operating Permit, 98-176-TV which consolidated all other existing air permits. Continental Carbon Company has sought and received revisions to its Permit, which, in some cases have further increased the amounts of allowable emissions. DEQ files are replete with citizen complaints of air pollution associated with carbon black and other emissions. It was because of these continuing complaints that Special Condition 15 was placed in the Permit. It states,

"The permittee shall take all reasonable precautions to minimize emissions of fugitive dust and prevent visible fugitive dust emissions from crossing the boundary of the property on which those emissions originated. These actions shall include, *but not be limited to* [emphasis supplied]: [OAC 252:100-8-6(a)(3)(A&B)]

a. Maintain and repair Unit 4 Bagfilter System so as to minimize, to the extent possible, any fugitive emissions of carbon black.

- b. Conduct product loading operations in such a manner so as to minimize, to the extent possible, any fugitive emissions of carbon black.
- c. Promptly clean any and all areas of the facility where carbon black has been spilled, blown, deposited, or accumulated so as to prevent the same from becoming wind-borne and/or air-borne.
- d. Conduct removal and replacement of bagfilters in such a manner that the replaced bagfilters, when space is available within the baghouse compartment, are placed into sealed containers prior to removal of the bagfilter from said compartment.
- e. Institute a routine inspection program whereby all high speed processing equipment, including large blowers, within the facility are inspected and lubricated according to a schedule of inspection."

Continental Carbon Company continues to violate Special Condition 15 of the Title V Operating Permit 98-176-TV (PSD) with its fugitive carbon black emissions. The DEQ has been well aware, based on the statements of its investigators over the years, that these emissions are occurring. However, the DEQ has made no effort to revise its inadequate investigating procedures so as to document pollution violations and initiate enforcement action.

The DEQ's failure to conduct adequate investigations and initiate enforcement actions constitutes a discriminatory practice that results in adverse and disproportionate air pollution impacts members of the Ponca Tribe.

2. Operational and Reporting Requirements

In late December of 2002, Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE), Local Union 5857 received information from its members who worked in Continental Carbon's facility indicating that there was a potentially catastrophic accident involving one or more thermal oxidizers. This information indicates that two oxidizers were damaged from being operated for extended periods of time at excessively high temperatures.

Special Condition 11 of the Permit originally stated that the oxidizers at the facility are to be operated within a specific temperature range. This range was between 1700 and 2100 degrees when the permit was first issued but later changed to 1500 to 2350 degrees at the company's request. Eventually, the DEQ removed the upward temperature range from the permit. However, the permit requires that the temperatures be monitored, recorded, and for records to be made available by the company when requested by the DEQ. Even though upward operating temperatures may no longer be identified in the permit, Complainants believe that the DEQ is still responsible for seeing that this pollution control device is properly operated and maintained.

The citizens concern over this alleged violation was understandable, given that Continental Carbon Company has a history of operating the oxidizers outside the permitted temperature range. During a 46-day period in 1999, the company operated outside the allowable temperature range one hundred and fourteen (11) times and failed to collect data on twenty-one (21) other occasions.⁴⁶

According to the information received by PACE and forwarded to the DEQ on December 6, 2002, the oxidizer for Units No. 1 and No. 2, and possibly the oxidizer for Unit No. 3, had been damaged from overheating to the extent that one or both of the tower stacks were leaning. (Exhibit 10) This indicated the possibility of serious structural damage and the risk of collapse. Should these 150 foot tall and 10 foot in diameter towers have collapsed, they could have hit oil transfer lines, a control room, and people who might be in the area. Without question, the members of the Ponca Tribe living adjacent to the facility would have been impacted.

PACE's December 6, 2002 letter to DEQ requested an investigation into possible violations of Permit 98-176-TV provisions related to the thermal oxidizer operating temperatures and record keeping requirement. The DEQ was reminded that the company had a history of operating the oxidizers outside of permitted temperature ranges and failing to record operating temperatures as required by the permit. A December 16, 2002, letter from DEQ to PACE, conveyed the agency's refusal to investigate. (Exhibit 11) The DEQ stated that an investigation was not necessary because an October 2002 compliance inspection had failed to identify violations. Obviously, an October investigation would not identify violations that may have occurred in November or December of 2002 when the incident occurred.

On Jan 9, 2003 the Ponca Tribe Office of Environmental Management joined PACE Local Union 5857 in requesting that DEQ conduct an investigation for possible permit violations related to oxidizer operations. (Exhibit 12) Although the DEQ referred PACE's complaint to the Occupational Health and Safety Administration (OSHA), the DEQ failed to exercise its responsibility to investigate possible Title V permit violations that were clearly within its jurisdiction.

On February 18, 2003, DEQ's General Counsel, responded to the January 9 letter from PACE and the Ponca Tribe. (Exhibit 13) This late late response coincided with the Ponca Tribe's request for information concerning an upcoming State Environmental Quality Board meeting and public forum.

The DEQ stated that the citizens' requests for an investigation failed to reference the time frame of the alleged violation. However, it was clear from the citizens' letters that the alleged violations occurred in the November-December time frame. It would have been appropriate and logical for the DEQ to review all records of operating going back to the last inspection. Additionally, a simple call from DEQ to the company would have revealed when the oxidizer was damaged and taken out of service, and when the 150-foot leaning tower was dismantled. Instead, the DEQ made no effort to investigate the incident.

The DEQ's disingenuous letter of February 18, 2003 conveyed the agency's refusal conduct an investigation into the alleged Title V Operating Permit violations unless the Ponca Tribe or PACE could "provide specific dates and/or documentation and witnesses." Clearly, the written complaint from PACE Local 5857, the official

representative of the employee organization within the plant, should have been sufficient for the DEQ to take action. The PACE representative's firsthand knowledge of the tower disassembly and plant shutdown should also have been sufficient to cause an investigation to be conducted. The DEQ was well aware that any documentation of the alleged violations existed in company records that the DEQ was refusing to review. Furthermore, the DEQ had the authority to investigate complaints made from individuals other than those working inside the plant, including complaints made by those wishing to remain "anonymous".⁴⁷

The selective and unreasonable standard of proof required by the DEQ for an investigation of this particular complaint further evidences the agencies discriminatory enforcement practice. The incident in question, which the DEQ refused to investigate, could have resulted in harm to members of the Ponca Tribe living adjacent to the facility. The DEQ's failure to investigate this complaint further demonstrates the agency's lack of concern for their health and safety.

OSHA eventually conducted an investigation of the incident, but only after its inspector was first refused entry to the facility by Continental Carbon Company. The company's report of the accident, which DEQ refused to ask for, showed that Oxidizer No 1 suffered from "extensive heat damage" and the structure was "weakened by heat, showed signs of failure and extensive buckling." The report also stated that 150-foot tall tower was "leaning to one side slightly" and had to be taken down and repaired in early December of 2002 for safety reasons. (Exhibit 14)

C. DEQ's Discriminatory Permitting and Enforcement Practices Concerning Surface and Subsurface Water Pollution

1. The DEQ refused to take enforcement action against Continental Carbon Company for operating a wastewater treatment and disposal system without a required permit, and for failure to make a timely permit renewal application.

The Continental Carbon Company facility is authorized by State Permit No.W-69-015 to treat and dispose of wastewater in several total-retention surface lagoons. The permit dated August 13, 1991 was in effect when Witco Corp. transferred ownership of the facility to Continental Carbon in 1995. However, the permit expired on August 12, 1996, along with Continental Carbon's authorization to operate the treatment and disposal system.⁴⁸ At the time the permit expired, Continental Carbon had yet to submit an application for a new permit. It was not until June 16, 1998 that a permit renewal application was made. (Exhibit 15) It was not until December 1, 1998 the new permit was issued.⁴⁹ (Exhibit 16) The company was allowed to operate its wastewater system for almost two and one-half years without valid a permit and almost two years without a permit application having been filed.

On March 14, 2002 representatives of the Ponca Tribe and others met with DEQ staff and requested, among other things, that the allegation that the company operated without a valid permit be investigated.⁵⁰ The DEQ never responded to this request. However, an

April 22, 2002 internal DEQ memorandum sent to DEQ Executive Director Mark Coleman characterized the alleged violation as nothing more than a "Paperwork violation which has been corrected."⁵¹

2. The DEQ refused to take enforcement action against Continental Carbon Company for misrepresenting important information its Application to Discharge and or Dispose of Industrial Wastewater or Sludge.

Continental Carbon's 1998 Application to Discharge and or Dispose of Industrial Wastewater or Sludge states that the depth to groundwater beneath the facility is 80 feet.⁵² It was signed by Plant Manager John Luton, who certified "under penalty of law," that the information in the application was "true, accurate and complete," to the best of his "true belief and knowledge."

The misrepresentation of groundwater depths in the permit application is a serious violation. The stated depth to groundwater is a determining factor in the approved design and placement of wastewater lagoons (also referred to as impoundments). State regulations require a separation of 15 feet between the bottom of the lagoons and the historic maximum groundwater table. This regulation recognizes the potential for contaminated of groundwater resources.

Continental Carbon Company knew, at the time the 1998 Application was prepared, that the actual depth to groundwater under its facility was not 80 feet, but closer to 20 feet. In December of 1996, after Continental Carbon purchased the facility, a monitoring well was drilled at the facility that encountered groundwater at 21 feet.⁵³ The depth of 21 feet is consistent with groundwater depths identified in the wells that were drilled at the facility in March of 1988. These shallow groundwater levels are also consistent with those identified in numerous area domestic well reports that were a matter of public record and available to Continental Carbon at the time of its permit application in 1998.⁵⁴

In February of 2002 representatives of PACE requested that the DEQ investigate the allegation that Continental Carbon misrepresented groundwater depths on its June 1998 Wastewater Permit Application.⁵⁵ On March 14, 2002 representatives of the Ponca Tribe and PACE with DEQ staff and again asked that the alleged misrepresentation be investigated and appropriate enforcement action be initiated. Citizens were told by DEQ staff attorney, that the groundwater depth of 80 feet was supported by a "stamped certified engineer's report" that had been provided by the company. However, no such document was found in agency files, nor was it produced by the agency in response to verbal requests and a March 21, 2002 written request. (Exhibit 17) Citizens feel strongly that the DEQ deliberately misled them about the existence of a "stamped engineer's report" so they would cease their inquiry into the matter.

On July 2, 2002, Gerald B. Davenport, an attorney for Continental Carbon Company, wrote the DEQ seeking to have Continental Carbon excused for misrepresenting groundwater depths in its permit application. (Exhibit 18) His letter blames the company's misrepresentation on the "ambiguity" of an old rule that used the terms "groundwater" and

"aquifer." However, the rule referenced by Mr. Davenport, which he says was in effect from 1988 into 1998, clearly required that the depth to groundwater was to be provided to the agency, *along with information about each well used to determine this depth* [emphasis supplied].

Continental Carbon provided no information with its application to support the stated depth of 80 feet to "groundwater" or to an "aquifer." Well records provided by citizens to DEQ in early 2002, showed much shallower groundwater under the facility. The agency finally agreed to address the issue and on June 20, 2002 wrote the company and stated, "the OWRB well drilling logs for the last 10 years, show no depth to ground water of 80 feet recorded in the Respondent's vicinity." (19)

Continental Carbon's permit application of June 1998 required, under "Section L. Groundwater Information," that the company list the "depth to groundwater" and the "legal description of each well used to determine groundwater information." Continental Carbon stated that the "depth to water" was "80 feet." The legal description of the well was identified only as "geological data." Although the company had records from three monitoring wells on its property indicating the depth to groundwater at about 20 feet, this information was omitted from the application.

The 1998 permit application also requested, under "Section M. Well Information," that Continental Carbon identify the "Static Water Level" on all wells within 1/2 mile of the lagoons. Continental Carbon identified two of the three monitoring wells on its property in this section, but did not identify the static water levels, or any water levels, in the wells. The lines on the application for this information were left blank.

Continental Carbon's attorney also referenced a 1988 Oklahoma Water Resources Board (OWRB) inspection report that identified the depth to groundwater at approximately 80 feet. However, the inspection report does not identify the source of this information and only repeats the information provided by Witco in its permit application of August 1987.

Continental Carbon's implication that the OWRB is somehow responsible for the company's misrepresentation of groundwater depths ten years later on the 1998 permit application is disingenuous at best. It was the Continental Carbon Company's responsibility to accurately determine and identify groundwater depths on the application. The company also had a continuing obligation, as stated in its permit, to provide the correct information to the DEQ. It failed to do so, even after the alleged "ambiguity" of the old rule referenced by Continental Carbon's attorney, was supposed to have been cleared up.

Rather than being confused about the DEQ's rules and requirements, it appears that Continental Carbon deliberately sought to deceive the agency about groundwater depths in order to obtain a wastewater permit for lagoons over shallow groundwater levels. A permit with accurate information might otherwise have been denied. If such a permit had been approved, it is likely that the lagoons would have been constructed differently and at greater expense.

The fact that the facility's previous owner may have initially misrepresented the depth of groundwater does not excuse Continental Carbon for its misrepresentation. When the facility changed ownership in July of 1995, Mr. Todd Miller, Director of Safety Health and Environmental Affairs, wrote the DEQ and stated,

"Continental Carbon hereby certifies that it is familiar with, understands, and shall satisfy and comply with the conditions and requirements contained in the above referenced permit and amendments thereto. Furthermore, Continental Carbon Company also certifies that any facility and technical information contained in the respective permit application currently on file with the agency *is accurate and shall remain so after the transfer* [emphasis supplied].

Apparently, the company knew the truth but did not tell it. It was concerned citizens and not the company, who first informed the DEQ of the false information on the permit application.⁵⁶ If the DEQ didn't know the information was false, it was only because the agency failed to follow its own regulations requiring the company to provide the supporting documentation of the stated groundwater depths. After concerned citizens brought the continuing misrepresentation to the DEQ's attention, the agency refused to initiate enforcement action and so informed the company in July of 2002.⁵⁷

3. The DEQ has refused to take enforcement action against Continental Carbon Company for violation of groundwater separation regulations.

According to the Wastewater Permit in effect from December 1, 1998 to October 31, 2003, Continental Carbon's wastewater lagoons must comply with OAC 252:616-7-1(4), that states the bottom of any surface impoundment (lagoon) shall be a minimum of 15 feet above the historic maximum groundwater table. The applicability of this requirement was confirmed in a June 20, 2002 letter from the DEQ to Continental Carbon.⁵⁸

There are currently four wastewater lagoons with contaminated wastewater depths of approximately 15 feet deep. The actual bottom of the lagoons, including the carbon black sediments and clay/soil "liner", is approximately 25 feet deep. A December 2, 2002 company document states that lagoon #5 is "25 feet in depth."⁵⁹ Citizens have alleged that there is less than the required 15-foot separation from this bottom to the groundwater encountered at a depth of about 20 feet.

A report provided by the company to DEQ in July 2002 calculates the distance to groundwater from the depth of wastewater in the lagoons, not from the bottom of the lagoons. Even with this flawed methodology, lagoon #6 is in violation of the separation rule.⁶⁰ The company's report was prepared pursuant to a May 6, 2002 Consent Order. (Exhibit 20) The Consent Order resulted from the February 12, 2002 Notice of Violation charging the company with several violations, including unauthorized discharge from one or more leaking lagoons. (Exhibit 21)

A report prepared by the engineering firm INTERA Incorporated, on behalf of the citizens, concludes that there may be less than a 15-foot separation between the bottoms

of *all* of the wastewater lagoons and shallow groundwater levels and that the lagoons may be leaking.⁶¹ (Exhibit 22)

When the DEQ issued the current permit approving the operation of the wastewater lagoons, it had not considered that they would be located over such shallow groundwater levels. Because the proposed permit contained false information when it was noticed for public comment, the public was denied the opportunity to make comments concerning the appropriate location, design, and operation of the lagoons.

On April 15, 2002 representatives of PACE and the Ponca Tribe first asked the DEQ to reopen Continental Carbon's permit to allow for the consideration of new information and to provide the opportunity for public hearing and comment. (Exhibit 23) The DEQ ignored this request.

4. The DEQ refused to take adequate enforcement action against Continental Carbon Company for violations of state and federal laws prohibiting unauthorized wastewater discharges.

In early January of 2002, the Ponca Tribe Office of Environmental Management discovered contaminated water leaking from the hillside below one of Continental Carbon's wastewater lagoons. A January 9, 2002 DEQ inspection confirmed that "black water" was found seeping from the ground just east of wastewater impoundment # 1.⁶² According to DEQ, this black water was forming streams that flowed toward the Arkansas River and collected in a pond or marshy area.⁶³ (Exhibit 24)

On January 16 the DEQ took samples of the seepage coming from the hillside below impoundment #1 (also identified as T01).⁶⁴ The seepage was contaminated with "Diesel Range Organics."⁶⁵ DEQ's investigator Brandon Bowman was present during this sampling and confirmed that the site of the contaminated seepage was next to lagoon #1 (T01).⁶⁶ The DEQ also found Diesel Range Organics in the swampy area by the river that the seepage drained into. Exhibit 25 is a photograph of the contaminated water taken by DEQ's investigator. Even though the seepage was suspected of coming from lagoon # 1, the DEQ did not sample of wastewater from lagoon #1 on January 16. Instead, a sample was taken from a lagoon to the north. The sample was found to contain Diesel Range Organics

The investigations of January 9 and 16 resulted in the February 12, 2002 Notice of Violation that charged the company with several violations, including the unauthorized discharge of wastewater from leaking wastewater lagoons. The Notice required the company to either correct the violations immediately or submit a "comprehensive plan" for the elimination and prevention of the violations within fifteen (15) days. The company failed to do either.

Continental Carbon's Todd Miller responded to the Notice of Violation (NOV) in a February 14, 2002 letter to DEQ's District Representative. Mr. Miller wrote, "As you had stated, the order will not contain fines or other conditions, other than to remedy the allegations in the NOV."⁶⁷ (Exhibit 26)

The DEQ's decision to waive penalties, even before the company had formally responded to the Notice of Violation, evidences discriminatory enforcement and the lack of concern for the Ponca Tribe whose representatives reported the violation, and whose members were placed at risk by the violations. Members of the Ponca Tribe believe that this assurance that penalties would not be assessed served only encourages future violations. The DEQ's actions let the company know that it could violate the law with little or no fear of having to pay penalties.

The DEQ's inadequate and discriminatory enforcement is further evidenced by its decisions to ignore additional violations discovered soon after the Feb 12 Notice of Violation was issued. On February 19, 2002, a DEQ investigator visited the facility and reported, "two (2) violations of the permit that had not previously been addressed."⁶⁸ (Exhibit 27) The investigator found that the wastewater levels of Lagoon #1 had been within 1 foot of the top of the berm, in violation of freeboard requirements. He also noted that a portion of the berm, "had been removed which has allowed wastewater to discharge at times of high fluid level..." These violations were ignored in the DEQ's February 12, 2002 Notice of Violation and the subsequent Consent Order.

5. The DEQ signed a Consent Order and Amended Consent Order that required inadequate investigations and failed to require corrective actions to address continuing violations or to prevent future violations.

In May of 2002, the DEQ and the company entered into a Consent Order to "resolve the issues of non-compliance" identified in the February 12, 2002 Notice of Violation. Prior to this settlement, representatives of the Ponca Tribe and others met with DEQ enforcement staff and requested, among other things, the opportunity to review and have input into any settlement concerning the wastewater lagoons.⁶⁹

On April 19, 2002 PACE and the Ponca Tribe made a written request to DEQ's Executive Director for a meeting on April 25.⁷⁰ The DEQ's General Counsel responded with proposed meeting date of May 7 or 8 instead. The Ponca Tribe and PACE asked the DEQ to provide a copy of the company's response to the Notice of Violation, "including their proposals for corrective action," prior to the planned meeting.⁷¹

Representatives of the Ponca Tribe and PACE later learned that the DEQ and the company met on March 14 and began working on a settlement of the Notice of Violation. This was the day after the DEQ met with representatives of the Ponca Tribe and PACE. By April 3, the DEQ had already finalized the settlement and sent a Consent Order to the company to be signed.⁷² The Consent Order was signed returned by the company finally signed DEQ's Executive Director on May 7, the day before the meeting was scheduled with the citizens.

When DEQ met with the citizens on May 8th, there was no opportunity for input into the Consent Order and the complaint of wastewater violations made by the Ponca Tribe was officially closed.⁷³ Citizens believe that DEQ's settlement of the wastewater violations

was deliberately orchestrated so as to deny the input of the members of the Ponca Tribe and others.

The controversial Consent Order did not required the company to take corrective action. Instead, it required the company to hire a professional engineer and submit "an approvable Engineering Report" containing a "water balance" on the facility, and a proposal for a "Permeability Study" on two of the facility's four wastewater lagoons. The February 12, 2002 Notice of Violation charged that wastewater was leaking and discharging off-site just below the southernmost lagoon (T01). However, the two lagoons that the Consent Order targeted for the "Permeability Study" were the northernmost lagoons. They are the *farthest* from the contaminated discharge that was the subject of the violation.⁷⁴ Exhibit 28 is a photograph showing the location of the lagoons and the area of the contaminated leakage.

Continental Carbon Company hired an Engineering firm to do the limited studies required by the Consent Decree. PACE International Union, on behalf of itself and the Ponca Tribe, hired INTERA Inc. to provide technical expert assistance on water contamination issues. INTERA Inc. was asked to evaluate the requirements of the Consent Order and the reports prepared by the company pursuant to the Consent Order. INTERA's evaluation was provided to the DEQ in August of 2002 and stated,

"In summary, the program outlined in the Consent Order does not address the evidence of a release in the area of Lagoon No. 1. It is evident that more work than is outlined in the Consent Order will be required to determine whether some or all of the lagoons at this site are leaking. Furthermore, the program outlined in the Consent Order, involving a water balance and permeability study, will not likely answer the question as to whether or not Lagoons 5 & 6 are leaking."

INTERA Inc. also concluded that groundwater levels were as much as eight feet higher than the depths measured in Continental Carbon's report, and that the lagoons were probably out of compliance with the groundwater separation rule. INTERA Inc. recommended that groundwater monitoring wells be installed to accurately determine the depth of groundwater levels beneath the lagoons.

The Ponca Tribe and PACE had previously requested the installation of monitoring wells to determine groundwater depths and the presence of contaminants in groundwater. Citizens made this request at the March 13, 2002 meeting with DEQ and in an unanswered April 15, 2002 letter to DEQ's Executive Director.

State law (OAC 252:616-5-4) specifically provides that the DEQ may require groundwater monitoring for wastewater contaminants when there is the potential for groundwater contamination. The DEQ's March 4, 2002 Notice of Violation, alleged such groundwater contamination. The potential for such contamination was also made clear to the DEQ in the citizens' letter of April 15, 2002 that conveyed documentation of a buried waste pit in the southeast corner of the facility. The buried waste site was used for railcar cleaning and containing spills. It contained contaminated liquid and sludge, including 1,1 dichloroethane, 1,1,1 trichloroethane, bis(2ethylhexyl)phthalate, oils, and grease. This

buried pit is near to, and up-gradient of, lagoon #1 and the area where the black contaminated seepage was discovered by the Ponca Tribe and documented by the DEQ.⁷⁵

This pit was never permitted by what was then the Oklahoma Water Resources Board (OWRB) and it was closed before the agency was informed.⁷⁶ It was never inspected by the agency prior to closure in order to ensure that migration of contaminants would not occur. According to the company, the pond was closed by adding dirt and a covering of concrete. The company's Unit #4 was constructed on top of the site when the facility expanded in the early 1990's. The Ponca Tribe believes this buried pit is clearly a potential source of existing or future groundwater contamination.

On January 16, 2002, the DEQ confirmed subsurface contamination following an investigation of a complaint by Continental Carbon employees who claimed that laboratory chemicals were being dumped down the facility's septic sewer system. When the DEQ inspected the septic system at the facility's laboratory, it was noted that there was a "manhole type cover which could be easily lifted."⁷⁷ The samples taken by DEQ contained di-n-butylphthalate and Bis(2ethylhexyl)phthalate. These are hazardous chemicals used in the laboratory. No violation was cited by the DEQ, and no corrective action or additional sampling was required by the DEQ.

Even though the DEQ rejected the citizens' February and April 2002 requests for the installation of monitoring wells, In July of 2002 the DEQ proposed to Continental groundwater monitoring wells be considered. However, the company refused DEQ's request because it was not a requirement of the Consent Order. (Exhibit 29) The company also refused to give the DEQ a proposal for a liner in the northernmost wastewater lagoon. After the company rejected DEQ's requests, the agency refused to exercise its authority and *require* the installation of monitoring wells and liners.

State law (OAC 252:616-5-4) specifically provides that the DEQ may revise a permit and add provisions for requirements such as groundwater monitoring wells when there is the potential for groundwater contamination. The DEQ refused to do so, knowing that there was contamination of groundwater, or the potential for such contamination at Continental Carbon Company's facility.

In September of 2002 the company and DEQ expanded sampling activities required by the May 2002 Consent Order to include all the lagoons and more of the seeps coming from the ground to the east of the facility. However, this sampling did nothing to establish the true depth of groundwater beneath the wastewater lagoons. Neither did it eliminate the possibility that subsurface contamination from the lagoons could be discharging directly to the Arkansas River. The springs or seeps that were covered up by the company in 2002 may have included those that previously evidenced the company's leaking lagoons.

In early 2003, when the DEQ was refusing to meet with citizens to discuss their concerns about leaking wastewater lagoons, the DEQ again met with the company behind closed doors and agreed to amend the Consent Order of May 2002. The May Order required

permeability studies of two wastewater lagoons to determine if they were leaking from their bottoms. In April of 2003, the Consent Order of May 2002 was amended so the company would not have to conducting the permeability study. Instead, the DEQ allowed the company to conduct a small number of shallow vertical soil borings on the *sides* of the lagoons. These borings did not even extend below the bottoms of the lagoon's liners. Even so, the DEQ allowed the company to use these borings to demonstrate that the *bottoms* of the lagoon were not leaking.

Ironically, the borings approved by DEQ, were only done on lagoon 5 and 6. However, the contaminated seepage that led to the Consent Order, was found near lagoon 1, at the other end of the plant. The Amended Consent Order of 2003 also accepted the company's Water Balance Study as proof that the wastewater lagoons were not leaking. The DEQ refused a specific request to meet with employees who operated the plant for years and who were prepared to identify flaws in the proposed study.⁷⁸

6. Denial of Meaningful Public Participation Opportunities

On April 29, 2003 the company submitted a wastewater permit renewal application that sought a "variance" to avoid current lagoon construction and location requirements. The application also proposed to leave the lagoons over shallow groundwater levels in violation of the 15-foot separation requirements. When citizens first sought to review the permit application at DEQ headquarters, they found that it had been removed from public review because of the company's claim of confidentiality.⁷⁹

The DEQ's General Counsel then informed the Ponca Tribe's environmental agency that the permit application could be approved before the application was made available for public review⁸⁰. The DEQ also informed citizens that no public hearing or comment period on the application was necessary prior to such approval. The DEQ's comments prompted a May 14, 2003 letter from the Chairman of the Ponca Tribe to the EPA requesting that the EPA intervene in the matter. (Exhibit 30)

The DEQ's continuing refusal to meet with citizens, its amendment of May 2002 Consent Order, and the removal of the wastewater permit application from public view, led members of the Ponca Tribe to believe that the agency was preparing to rubber-stamp the wastewater permit application. These developments, and the agency's decision to cease investigating air pollution complaints, prompted the sit-in protest of May 19, 2003. A group of citizens, including members of the Ponca Tribe, refused to leave DEQ's offices until the agency agreed to meet with them and discuss their concerns. It was at this sit-in protest, lasting into the evening, that the Oklahoma Secretary of the Environment intervened and secured the citizens their requested meeting. The DEQ agreed to the meeting, but with the condition that EPA not be in attendance.

At the June 6, 2002 meeting between with concerned citizens, the DEQ was presented over a thousand petition signatures requesting a hearing. The DEQ then agreed to hold a public meeting and provide public comment opportunities on Continental Carbon's wastewater permit application. Unfortunately, this will not be a formal administrative

hearing and the company will have the benefit of DEQ's prior approval of the flawed studies associated with the inadequate enforcement action and Consent Orders.

D. DEQ's Inadequate Investigations and Discriminatory Enforcement Practices Concerning Continental Carbon Company's Industrial and Solid Waste Management Practices.

On February 29, 2002 representatives of the Ponca Tribe and others discovered an industrial waste dumpsite in the woods next to Continental Carbon's facility. It was discovered while they were investigating suspected leaks from facility's wastewater lagoons. DEQ investigators, who were in the area just two weeks earlier, failed to see, or did not report the dumpsite.⁸¹ The dumpsite was on company property and contained about 20 rusted chemical drums, and other industrial waste, including 800 to 900 gallons of carbon black. (Exhibit 31) The dumpsite just was sitting in the flood plain of the Arkansas River, located less than 100 yards away. Springs or seeps from the ground ran through the barrels, discolored soil, and sludge, toward the river.

The DEQ was called to investigate the dumpsite and was asked to notify the representatives of Ponca Tribe and PACE when the investigation took place. Instead, the DEQ investigators came to the site without contacting the complainants, and took only three samples from the entire site. One sample was from a "spring" and two samples were taken of what DEQ thought was solidified waste. No soil samples were taken and no photographs of the sampling locations were taken.⁸² The DEQ then allowed the company to conduct an unsupervised cleanup of the barrels that left waste, sludge, and contaminated soil behind. Photographs of the site show that much of the waste was merely covered over. (Exhibit 32)

After the DEQ approved "cleanup" of the chemical barrels, approximately 30 tons of what DEQ described as, "non-hazardous industrial waste" still remained.⁸³ The DEQ did not require the area to be fenced off or the remaining waste to be cleaned up. Dumping continued as before. When citizen complaints continued, the DEQ's local investigator informed the company that the dumpsite on its property was a violation of Oklahoma State Statute. On March 19, he warned the company it might have to cleanup the entire site if, "further dumping should occur."⁸⁴ The company was given until April 3, 2002 to control access to the site and discourage additional dumping. (Exhibit 33)

Despite DEQ's warning, dumping in Continental Carbon's property continued and was again confirmed by the DEQ's local inspector.⁸⁵ However, DEQ state office did not issue a Notice of Violation as it threatened. Instead, the company was allowed to use penalty funds from an unrelated violation to help pay for the additional cleanup of the area as a "Supplemental Environmental Project."⁸⁶ Since these penalty funds would have otherwise gone to public coffers, the DEQ's action served to shift this cost of cleaning up the illegal dumpsite from the company to Oklahoma taxpayers.

Because the company claimed that dumping had taken place without its knowledge, and *despite its efforts to have it stopped*, the company was considered to be an "Innocent

Landowner" and free of responsibility. The company represented to DEQ that it made previous attempts to stop the dumping and conduct cleanup activities.⁸⁷ However, the local DEQ investigator stated that he had never seen signs or fences to discourage dumping in the area. Neither was the Ponca Tribe's Environmental Agency, whose staff patrolled the area for years, aware of any company efforts to discourage or clean-up dumping. Signs against trespassing were only posted by the company *after* the illegal industrial waste was discovered and publicized by citizens in February of 2002. The DEQ did not request, nor did the company provide, any proof to justify the granting of Innocent Landowner status.⁸⁸

The Ponca Tribe and later learned that Continental Carbon, with DEQ's approval, had approximately 40 truckloads of dirt and fill hauled into the area of the illegal dumpsite. The company's stated reason was to widen the road. However, DEQ's local investigator stated, "This has had the effect of burying a portion of the solid waste that was not cleaned up during the past few weeks" and "burying some of the springs..."⁸⁹ (Exhibit 34) Members of the Ponca Tribe believes that these buried "springs" include the seepage that evidenced the leaking wastewater lagoons. The DEQ and the company say they can no longer find this contaminated seepage.

On May 9, 2002, representatives of the Ponca Tribe and PACE met with DEQ to discuss their concerns about the industrial waste site and the DEQ's approval of the company's unsupervised and inadequate cleanup. In the news articles appearing immediately after the meeting, the DEQ publicly stated that the environmental complaints were untrue and were motivated by a union dispute.⁹⁰ This characterization of the dispute ignored the fact that the initial complaint about leaking wastewater lagoons came from the Ponca Tribe, not members of a labor union. It was after this May 9, 2002 meeting, that DEQ refused to meet with Ponca Tribe and other concerned citizens to discuss continuing pollution problems.

The DEQ's published statements focused on the labor dispute and ignored or minimized the concerns expressed by the Ponca Tribe. The DEQ also ignored the Ponca Tribe's role in discovering the illegal wastewater discharges and the illegal dumpsite. The DEQ's statements served to characterize the Ponca Tribe as dishonest and without legitimate concerns.

DEQ's published statements were made by spokesperson Michael Dean just before Ponca Tribe members and other citizens began their May 9, 2002 meeting with DEQ General Council Jimmy Givens and other agency staff. At the same time Mr. Givens was leading members of the Ponca Tribe and other concerned citizens to believe that their legitimate concerns were being considered, DEQ's spokesperson was reporting to the news media that citizens' concerns had little or no merit. The DEQ never responded to the Ponca Tribe's and PACE's requests to correct the misrepresentations.

Following the May 9, 2002 meeting, the DEQ invited a representative of PACE to accompany a DEQ investigator on a visual inspection of the area where the industrial waste dumping had been discovered. However, the DEQ did not invite a representative

of the Ponca Tribe to join in the inspection, nor did the agency notify the Ponca Tribe that an investigation was being planned. It was only later, after PACE insisted on the inclusion of the Ponca Tribe, that DEQ's General Counsel verbally agreed to the Ponca Tribe's participation.

Although the DEQ agreed to the Ponca Tribe's participation in the planned inspection, the DEQ did not bother to tell the Continental Carbon's management. Only after the DEQ, PACE, and representatives of the Ponca Tribe met at the public roadside near the dumpsite, was it revealed that the DEQ had *not* informed the company. The company was willing to allow the PACE representative on their property to inspect the dumpsite, but not representative of the Ponca Tribe.

The representative of PACE refused to participate in the inspection unless the representative of the Ponca Tribe was also allowed to participate. Both representatives had seen the dumpsite before the company altered it, and both wanted to make sure the correct area was going to be inspected. DEQ representatives who were present did not advocate for the inclusion of the Ponca Tribe in the inspection.

Instead, the DEQ's response to the PACE's insistence on the Ponca Tribe's participation, was simply to leave. Although the area of the sludge, visible oil, and debris was just off the public road on the company's property, DEQ inspectors returned to Oklahoma City without conducting any kind of inspection. The DEQ official spokesperson then misrepresented to the news media that the agency had never agreed to include the Ponca Tribe in the inspection.⁹¹ The DEQ then refused a written request from the Ponca Tribe and PACE to correct the false statements to the media.⁹² (Exhibit 35)

When Ponca Tribe and PACE representatives previously met with DEQ, they expressed their concern that all of the barrels at the dumpsite had not been tested or cleaned up. Citizens reported that more than a dozen barrels had been found at the site. However, after DEQ's investigator accompanied Continental Carbon's manager to the site, the investigator reported seeing only, "a few rusted metal 55 gallon drums." The citizens' pictures of the dumpsite, taken immediately after the company's so-called "cleanup," revealed that contaminated sludge and oil were left behind.

The Ponca Tribe's Environmental Director, told the DEQ of a barrel containing an oily substance he saw at the site before the company's "clean-up" took place. He did not tell the DEQ that the barrel still remained at the site, only that the agency had failed to test the oil in the barrel. However, the DEQ later claimed the purpose of the follow-up investigation was to look for the barrel. This led citizens to believe that the DEQ may have set up a bogus inspection to look for a barrel that they knew would not be found.

On June 19, 2002, Ponca Tribe and PACE members picketed the DEQ state office to draw attention to continuing pollution problems and the agency's lack of enforcement. Following the protest, DEQ's spokesperson Michael Dean was quoted in the Ponca City News to say,

"One thing we don't do is get involved in disputes between unions and companies. That is the crux of the matter here and the DEQ is not the appropriate forum to address it."

Members of Ponca Tribe believe that the DEQ has used the existence of a labor dispute as an excuse to continue its discriminatory enforcement and permitting practices. Members of PACE and the Ponca Tribe share the same goal of making Continental Carbon Company's facility as safe and clean as possible. PACE and the Ponca Tribe representatives repeatedly and publicly stated that the existence of a labor dispute should make no difference in DEQ's enforcement decisions, and neither group asked the DEQ to do anything more than enforce environmental laws.

People who work at Continental Carbon Company, and those who live nearby, are all impacted by the company's pollution. The difference is that company employees leave work and go home to cleaner and safer communities. However, the homemakers, children, and elderly members of the Ponca Tribe living next to the facility are exposed to its pollution around the clock.

The problems that Ponca Tribe member [REDACTED] brought to the DEQ in June of 2002 had nothing to do with a labor dispute. Her problems were the same as those that other Ponca Tribe members have complained about for years. In a June 19, 2002 Ponca City News article titled "Ponca Citizens Set Up Pickets At Oklahoma City's DEQ Office," [REDACTED] states,

"I won't let my four-year-old out outside. We have to drive into town to the parks to ride her bike. When the kids go outside, they come in covered with black. We tried the swingset once, but it was always covered with black. We can't have a garden or even a picnic table. I just want to let my little one go outside." (Exhibit 36)

It is because of DEQ's discriminatory permitting and enforcement practices that families suffer and pollution problems continue.

Endnotes

1. Estimated income provided by Ponca Tribe Office of Environmental Management.
2. The November 6, 1992 Notice of Violation issued to Witco Corp. by the DEQ references Oklahoma Air Pollution Control Rules, OAC 310:200-7, Section 15 (e) which states that violations of permit limitations shall subject the owner/operator to enforcement penalties, "including permit revocation."
3. Consent Order, Case N0.93-159, signed January 6, 1994 states, "Unit 4 has continuously operated since October 14, 1991; to date, respondent has not demonstrated compliance with emissions limitations as stated within Permit No. 89-020-C (PSD) (M-1)..."
4. Loss Control Engineering Report prepared for Continental Carbon, September 1, 1999.
5. April 12, 2002 Memorandum to DEQ Executive Director Marl Coleman; Subject: Continental Carbon-Report of April 11, 2002 Public Meeting.
6. An August 12, 2002 letter requested that DEQ meet with representatives of PACE, the Ponca Tribe, the Just Transition Alliance and the Indigenous Environmental Network, to discuss groundwater contamination concerns. The DEQ replied that the meeting was "unwarranted." On January 17, 2003 Ron Sherron of the Ponca Tribe and Todd Carlson of PACE wrote DEQ Executive Director Steven Thompson and requested a meeting to discuss an emergency rule change that would have allowed members of the Ponca Tribe a public hearing on Continental Carbon's wastewater permit renewal application. State law clearly allows for the DEQ Executive Director to meet with concerned citizens to discuss emergency rule changes. The DEQ Executive Director did not respond to the letter.
- 7 April 4, 2003 Memorandum from DEQ Executive Director to Members of the Environmental Quality Board and Members of the DEQ Advisory Councils Re: Public Hearing Sponsored by Ponca tribe of Oklahoma.
- 8 On May 19, 2003 Representatives of the Ponca Tribe and others went to DEQ's offices with samples of the carbon black fallout from on and inside their homes. They even brought black snowballs saved from the winter and the delivered hundreds of petition signatures demanding that DEQ hold a public hearing on Continental Carbon's wastewater permit renewal application. When citizens arrived at 11 a.m., DEQ's General Counsel told them there would be no meetings with DEQ staff, at any time. Citizens then parked in front of the DEQ Executive Director's office and vowed not to leave until agency agreed to meet, even if it meant going to jail. It was not until 7:30 at night that the DEQ agreed to meeting with citizens hosted by Oklahoma's Secretary of the Environment. Even then, DEQ refused the citizens' request for an EPA representative to be present.
9. DEQ December 22, 1994 Evaluation of Permit Application No 89-020-C (PSD) (M-2)
10. The November 6, 1992 Notice of Violation issued to Witco Corp. by the DEQ references Oklahoma Air Pollution Control Rules, OAC 310:200-7, Section 15 (e) which states that violations of permit limitations shall subject the owner/operator to enforcement penalties, "including permit revocation."
11. Consent Order, Case N0.93-159 states Unit No 4 performance test results were conducted on April 7-8, 1992. Test results showed nitrogen oxides (NOX) above the limitations stated within Permit No. 89-020-C (PSD) (M-1). Performance

testes were again performed on August 3-8, 1992 and November 17-18, 1992. These tests also failed to demonstrate compliance with particulate matter emissions limitations of the permit.

12. June 29, 1993 Oklahoma State Department of Health Air Quality Service Memorandum; Subject: Witco Concarb Unit 4 Compliance History.

13. Consent Order, Case N0.93-159, signed January 6, 1994 states, "Unit 4 has continuously operated since October 14, 1991; to date, respondent has not demonstrated compliance with emissions limitations as stated within Permit No. 89-020-C (PSD) (M-1)..."

14. Order of Closing signed April 7, 1995, Case No. 93-159

15. December 22, 1994 DEQ memo from Environmental Engineer David Schutz to Joyce D. Sheedy, Acting Director, DEQ Permits Section.

16. This conclusion is based on a review of all complaints and investigation reports in DEQ files and from interviews conducted in 2001 and February of 2003 with Ponca Tribe members living in the cluster of homes closest to the facility.

17. Residents living near Continental Carbon Company stated this at a January 30, 2003 community meeting sponsored by the Ponca Tribe.

18. July 18, 1995 Memorandum from DEQ's Keith Duncan and Kent Stafford to DEQ's Larry Byrum; Subject: CCC (Witco) carbon black sampling protocol.

19. October 16, 1995 letter from Continental Carbon Company's Attorney Gerald B. Davenport to DEQ's Michael A. Peters, Esq.

20. July 18, 1995 Memorandum from DEQ's Keith Duncan and Kent Stafford to DEQ's Larry Byrum; Subject: CCC (Witco) carbon black sampling protocol.

21. May 21, 1996 e-mail communication between DEQ's Monte Elder and Gary Collins and Larry Byrum

22. Review of DEQ Data Complaint Investigation Forms for years 1996 through 2002 and interviews with citizens living in the area of the facility.

23. October 16, 1995 letter from Continental Carbon Attorney Gerald Davenport to DEQ's Michael Peters.

24. May 21, 1996 e-mail communication between DEQ's Monte Elder and Gary Collins and Larry Byrum.

25 March 7, 2003 DEQ Air Quality Division Inspection Report.

26. DEQ Data Complaint Form, Complaint Number 300-00-02999, February 18, 2002 interviews with DEQ Air Quality Division staff, interviews with residents living near the facility.

27 DEQ Data Complaint Form, Complaint Number 300-00-31616

28. DEQ Data Complaint Form, Complaint Number 300-00-29566

29. DEQ Data Complaint Form, Complaint Number 300-00-24020

30. DEQ Data Complaint Form, Complaint Number 300-00-15165

31. DEQ Data Complaint Form, Complaint Number 300-00-13243

32. DEQ Data Complaint Form, Complaint Number 300-00-08303

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33. DEQ Data Complaint Form, Complaint Number 300-00-03247
34. DEQ Data Complaint Form, Complaint Number 300-00-02865
35. DEQ Data Complaint Form, Complaint Number 292-36-00025
36. February 18, 1998 DEQ Memorandum to: File from : Gary Walz^e, Environmental Specialist, Enforcement and Compliance Unit.
37. November 5, 1999 letter from DEQ Environmental Specialist Supervisor, John F. Cullin, to a complainant
38. February 19, 2003 interview with DEQ Air Program Specialist, Garylee Walze, who travels from the DEQ Oklahoma City office to investigate complaints. Also interviewed was Doyle McWhirter, DEQ Program Manager for Compliance, and Kendal G. Cody, DEQ Environmental Attorney Supervisor.
- 39 On May 20, 2002, in response to Complaint 300-00-0027212, the DEQ investigator noted black emissions coming from a filter baghouse and "traveling across the western edge onto adjacent property."
- 40 DEQ's interpretation of the Rules were explained to representatives of the Ponca Tribe and other concerned citizens at an August 6, 2003 meeting with Craig Kennamer, DEQ's Deputy General Counsel and Kendal G. Cody, Environmental Attorney Supervisor.
- 41 DEQ Notice of Violation dated September 23, 1998 following the 1997 Complaint Investigations 292-99-97-02847 and 292-99-97-02865. The Notice of Violation DEQ alleged that Continental Carbon violated OAC 252:100-25: Smoke, Visible Emissions and Particulates. OAC 252:100-25 is unchanged as of the filing of this complaint.
- 42 When Complaint 292-99-97-02865 and 292-99-97-02847 were investigated on 9/11/97, the DEQ investigator noted in both cases that he observed, "a very heavy coating of fine, black powdery substance on his (complainant's) outdoor property." The complaints were investigated minutes apart and the investigator noted that no emissions were observed coming from the facility at the time.
- 43 Following a leaking bag filter problem at Continental Carbon on the evening of March 15, 2003, three separate complaints were filed by citizens who found their property covered with pollution on the morning of March 14 2003. When the complaints were investigated by DEQ, the investigator observed "black powdery material," "black particulate matter," and "black specks" on outdoor premises and vehicles.
- 44 August 6, 2003 meeting between DEQ staff and representatives of the Ponca Tribe, PACE, and Concerned Neighbors of Continental Carbon.
- 45 §75-253. Oklahoma Statute Title 75 Section 253 A states, " If an agency finds that an imminent peril exists to the preservation of the public health, safety, or welfare, or that a compelling public interest requires an emergency rule, amendment, revision, or revocation of an existing rule, an agency may promulgate, at any time, any such rule, provided the Governor first approves such rule pursuant to the provisions of this section.
46. July 26, 2000 DEQ Request for Information to Continental Carbon Company; January 18, 2000 DEQ Memorandum from Doyle McWhirter from Pam Dizikes, Subject: Continental Carbon Corporation
- 47 Oklahoma Department of Environmental Quality Administrative Procedures Manual , revised 01/15/02.

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62. January 9, 2002 cover letter and investigation report by DEQ's Brandon Bowman.
 63. January 9, 2002 cover letter and investigation report by DEQ's Brandon Bowman.
 64. February 12, 2002 Notice of Violation states impoundment T101 is "directly west and opposite the site where the "black substance oozed out from under the ground..."
 65. January 9, 2002 cover letter and investigation report by DEQ's Brandon Bowman.
 66. Map with May 15, 2002 notations by DEQ inspector Brandon Bowman shows where DEQ's Adebawale Adesanwo took the sample of seepage, on January 16, 2002, following complaint by Ponca Tribe. Sample taken directly east of wastewater impoundment #1.
 67. February 14, 2002 letter from Continental Carbon's Todd Miller to the Adebawale Adesanwo of DEQ's Water Quality Division
 68. February 21, 2002 memorandum to Wayne Craney, Manager of DEQ's Municipal and Industrial Enforcement Section of the Water Quality Division from Donald D. Barrett, P.E., of DEQ's Wastewater Discharge Permit Section of the Water Quality Division.
 69. This and other requests were made to the DEQ when representatives of the Ponca Tribe, PACE, and Oklahoma State Senator Paul Muegge met with DEQ staff on March 13, 2002.
 70. The April 19 2002 letter was received by the DEQ on April 22
 71. April 25, 2002 letter to DEQ General Counsel, Jimmy D. Givens from Ponca tribe Environmental Director, Ron Sherron and representatives of PACE.
 72. April 24, 2002 letter from Continental Carbon Company to Jon Craig, Director of DEQ's Water Quality Division states that the signatures on the Consent Order were requested by DEQ on April 3, 2002.
 73. June 14, 2002 letter from DEQ's Adebawale Adesanwo to Ron Sherron, Ponca Tribal OEM stated, "As a result of the Consent Order being offered, and executed, the above referenced complaint has been closed."
 74. There are four lagoons along the eastern edge of the facility. They are lagoon #1, #3&4 (considered as one), #5 and #6. Only two of these lagoons, #5 and #6, were sampled for the company's report, even though seepage can be found coming from the ground downhill and down-gradient from all of the lagoons.
 75. Map dated June 6, 1988 shows location of wastewater lagoons with old identifying numbers. Also shown is site of buried waste pit near what is now Lagoon #1 and upgradient of where contaminated seepage was discovered in January of 2002. The map also reflects that a monitoring well had been planned in the area and the lining of Lagoon #1 with a HDEP liner.
 76. July 15, 1991 Oklahoma Water Resources Board Memo to File by John Markland
 77. February 6, 2002 Memorandum to File by Dee Ready, Environmental Program Specialists, Solid Waste Compliance Unit of the DEQ Land Protection Division.
 78. On several occasions representatives of PACE, who had worked in the plant for years, offered to meet with DEQ and explain the flaws in study proposed by the company. The DEQ refused this offer.

79 Citizens requesting to see the application were given a note by DEQ staff stating that the file was under review by General Counsel and "stored in confidential records."

80 May 14, 2003 letter to EPA Region 6 Director, Richard Greene, from Bennet Arkeketa, Chairman, Ponca Tribe of Oklahoma

81. On January 16, 2002, DEQ investigators were in the area to take samples of black water seeping from the ground that had been discovered by the Ponca Tribe.

82. March 5, 2002 Memorandum to File from Dee Ready, Environmental Program Specialist, DEQ Land Protection Division.

83. April 26, 2002 letter from DEQ's Dee ready to Ken Parr, Ponca City Vishi Four Eyes, Phase II (landfill).

84. March 19, 2002 letter from DEQ's Brandon Monroe to Continental Carbon Plant Manager, John Luton.

85. DEQ's Brandon Monroe investigated and confirmed the complaint made by PACE member, [REDACTED]. Mr. Monroe informed [REDACTED] that his superiors would not act on the complaint and had granted Continental Carbon Company Innocent Landowner status.

86. The company was allowed to use penalty funds from an unrelated violation to pay for the cleanup. The cleanup was allowed by the DEQ to be designated as a Supplemental Environmental Project and paid for by penalty funds that would have otherwise gone to public coffers. The \$1000 penalty was assessed against the company for violations of Public Water Supply laws (Case No. 02-093).

87. April 2, 2002 letter from Continental Carbon's Attorney Gerald Davenport to DEQ's Brandon Bowman

88. Discussions by PACE and Ponca Tribe representatives with DEQ's Environmental Specialist Brandon Monroe; No documents were located in DEQ files that reflect the agency requested or located documentation of efforts to discourage dumping or previous attempts to clean-up the area.

89. May 20, 2002 e-mail from DEQ's Brandon Bowman to DEQ's Rick Austin and others, Subject: Continental carbon/open dumping-partial burial of waste." Employees of Continental Carbon estimated the number of truckloads at 40.

90. May 10, 2002 Daily Oklahoman article by Rick Robinson, "Union, Tribe Protest Plant's Environmental Practices in Ponca City, Oklahoma"; May 10, 2002 Ponca City News article by David Davis, " PACE, Ponca Tribe Protest Lack of DEQ Action at Plant."

91. May 30, 2002, Ponca City News article, "Planned Inspection Off Following Disagreements," by David Davis quotes DEQ's Michael Dean stating, "We negotiated with the company and it was agreed that the one union member could show us where the barrel is located. "They (PACE) were part of the agreement, but when it comes down to the time to enter the property, they want several people to go in."

92. July 14, 2002 letter to DEQ Executive Director Mark Coleman, from PACE

EXHIBITS

1. Presidential Executive Order No. 12898
2. February 10, 1994 letter from Genevieve Pollak, Chairman of the Ponca Tribe of Oklahoma
3. Loss Control Engineering Report prepared for Continental Carbon, September 1, 1999
4. January 6, 1994 Consent Order, Case N0.93-1595
5. March 3, 1995 Memorandum of Understanding
6. July 18, 1995 DEQ Internal Memorandum on sampling protocol
7. May 21, 1996 DEQ e-mail communication on sampling protocol
8. November 5, 1999 letter from DEQ to a complainant
9. March 25, 2003 letter from DEQ to [REDACTED]
10. December 6, 2002 letter from PACE to DEQ re: oxidizers
11. December 16, 2002 letter from DEQ to PACE re: oxidizers
12. January 9, 2003 letter from Ponca Tribe and PACE re: oxidizers
13. February 18, 2003 DEQ letter to Ponca Tribe and PACE
14. January 7, 2003 report and photographs of oxidizer damage
15. June 16, 1998 (OPDES) Wastewater Treatment and Discharge Permit Renewal Application
16. December 1, 1998 (OPDES) Wastewater Treatment and Discharge Permit
17. March 21, 2002 letter to DEQ from PACE requesting information
18. July 2, 2002, letter from Continental Carbon attorney to DEQ
19. June 20, 2002 letter to Continental Carbon from DEQ re: groundwater depths
20. May 6, 2002 Consent Order.
21. February 12, 2002 Notice of Violation
22. INTERA Incorporate report on Lagoon 5 and 6 Study
23. April 15, 2002 letter to DEQ from PACE requesting information and action
24. January 9, 2002 DEQ cover letter and inspection report
25. Photograph of contaminated pond taken by DEQ investigator
26. February 14, 2002 letter from Continental Carbon's Todd Miller to DEQ
27. February 21, 2002 DEQ internal memorandum re: additional violations
28. Photograph of facility showing lagoons and areas of contamination and investigations
29. August 28, 2002 letter from Continental Carbon's attorney refusing DEQ requests
30. Letter to EPA from Chairman of the Ponca Tribe
31. Photographs of industrial waste site discovered by Ponca Tribe and PACE
32. Photographs of industrial waste site after DEQ approved "cleanup"
33. March 19, 2002 DEQ letter to company warning of possible violation.
34. May 20, 2002 DEQ email communication re: waste and springs being buried by company
35. June 14, 2002 PACE letter to DEQ re: misrepresentations to news media
36. June 19, 2002 article, The Ponca City News